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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 613

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal, First Appellate District, State of California.

Statement as to Jurisdiction

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OCTOBER TERM, 1955.

No. .....

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
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vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal, First Appellate District, State of California.

Statement as to Jurisdiction

In compliance with Rules 13(2) and 15 of the Revised Rules of this Court, appellant, Pacific Gas and Electric Company (Pacific), submits herewith its statement as to the basis upon which this Court has jurisdiction on appeal to review a judgment and decision of the District Court of Appeal of the State of California, the highest court of the State of California in which a decision could be had.

OPINION BELOW

The opinion of the District Court of Appeal is reported at 134 A.C.A. 181[1], 285 P.2d 305. A copy is attached hereto as Appendix A.

JURISDICTION

The judgment of the District Court of Appeal was entered June 27, 1955. A petition for hearing by the Supreme Court of the State of California was filed on August 5, 1955, and denied August 17, 1955. The State Supreme Court had jurisdiction to grant a hearing within 60 days of the decision of the District Court of Appeal, on petition filed within 40 days (Cal. Const. Art. VI, Sec. 4(b) and (c); Rule 28 of California Rules on Appeal).

Notice of appeal to the Supreme Court of the United States was filed with the District Court of Appeal on November 8, 1955. The appeal is timely. Title 28 U.S.C. Sec. 2101(c).

The judgment of the District Court of Appeal is that of the highest court of the state in which a decision could be had. No appeal lies from decisions of District Courts of Appeal in California to any other state court. Although the State Supreme Court had discretionary power to grant a hearing, it denied a timely petition that it do so (see above). The judgment of the District Court of Appeal is therefore the judgment to be reviewed. *Market Street Railway Co. v. Railroad Commission of California,* 324 U.S. 548; *American Railway Express Co. v. Levee,* 263 U.S. 19.

The suit was one for refund of sales taxes assessed, in an amount in excess of $300,000, upon the transfer of appellant's entire electric distribution system in Sacramento, California, pursuant to a decree in condemnation. Trial was

1. 134 Advance California Appellate Reports 181.

held on the special defense of the appellee that the suit was barred by Section 6933 of the California Revenue and Taxation Code. Appellant contended that if Section 6933 and Sections 6906 and 6486 of the California Revenue and Taxation Code were construed so as to bar appellant's action on the facts of this case, then those sections were invalid as being repugnant to the constitution of the United States.

Section 6933 provides:

> "Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 of this chapter, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> "Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Section 6906 reads as follows:

> "Within 30 days after disallowing any claim in whole or in part the board shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination."

Section 6486, which prescribes the procedure for service of a notice of a deficiency determination, reads as follows:

> "The board shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination. The notice may be served personally or by mail; if by mail, service shall be made pursuant to Section 1013 of the Code of Civil Procedure and shall be addressed to the retailer or person storing, using, or consuming tangible personal property at his address as it appears in the

records of the board. In case of service by mail of any notice required by this part, the service is complete at the time of deposit in the United States post office."

Section 1013 of the California Code of Civil Procedure reads as follows:

"In case of service by mail, the notice or other paper must be deposited in the United States post office, or a mail box, sub-post office, substation, or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or any act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all."

The judgment of the District Court of Appeal was that appellant had been served with notice as provided by the above statutes, that those statutes as applied to the facts barred appellant's action and that as so applied, the statutes were valid. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28 U.S.C., Section 1257(2).

QUESTIONS PRESENTED

Appellant's electrical distribution system in the Sacramento area was taken by condemnation. Deeming this

divestment of property by judicial fiat to be an exercise by appellant of "the privilege of selling tangible personal property at retail", the State of California's Board of Equalization assessed appellant with a sales tax of approximately $300,000. Appellant's counsel promptly questioned the validity of this unprecedented action of assessing a sales tax upon a condemnation award by filing a petition with the Board for a redetermination of the tax. The petition was denied.

Notice of denial of the petition was transmitted with a covering letter addressed to appellant's leading counsel of record, Mr. Chaffee E. Hall, 351 California Street, San Francisco, California, with copy to appellant. The tax was then paid and appellant's counsel filed a claim for refund.

Like the petition for redetermination, the claim for refund bore the names and addresses of appellant's counsel in the usual place, the upper left hand corner of the first page. No other designation of address appeared thereon. The Board denied the claim and mailed a purported notice of the denial. The Board failed to mail the notice to any of appellant's counsel of record. Its only notice was mailed to appellant, a large corporation, at its main office—addressed simply "Pacific Gas and Electric Company, 245 Market Street, San Francisco, California". The notice did not identify the transaction to which it related, other than by reference to the amount of the claim. Although sent to appellant instead of to its counsel, it made no mention of the statutory requirement that a judicial hearing on a claim for refund can be obtained only if suit is filed within 90 days from the date notice of the Board's denial of the claim is mailed.[2] Nor did it give the date of the mailing

2. California Revenue and Taxation Code Section 6933, page 3, supra.

of the notice. The purported notice was received by the Company's auditing department where it was seen by several employees and then placed in that department's files. None of those employees was an attorney and none realized the legal significance of the document. Hence, the notice was not brought to the attention of appellant's counsel. Appellant's counsel did not learn that the Board had denied the claim and mailed a purported notice thereof until 5½ months after the date of mailing. Appellant's counsel finally learned of the denial when it was mentioned during a telephone conversation on another matter between appellant's counsel and counsel for the Board.

Not only did the Board fail to serve notice on appellant's counsel, but during the crucial 90 day period the Secretary and three members of the five-man Board led appellant's counsel to believe, by statements in response to specific inquires about the status of the claim made at the request of appellant's counsel, that the claim had not yet been acted upon.

The California Revenue and Taxation Code makes the mailing of a notice of denial or the lapse of six months from filing the claim (whichever occurs first) a condition precedent to the right to a judicial determination of the validity of the tax. Suit must be filed within 90 days of the mailing of a valid notice of denial. In the instant case, because appellant's counsel did not learn of the denial of the claim until after the 90 days had elapsed, suit was filed more than 90 days after the mailing of the purported notice of denial. It was filed less than 90 days after appellant's counsel were first apprised of the Board's denial of the claim.

The court below has construed the California Code provisions as authorizing a notice of denial given in the form

and manner employed here. It also held that the code provisions as so construed are valid as meeting the constitutional requirements of due process. Accordingly, the court held that appellant's suit is time-barred.

The questions presented by this appeal are:

1. Did the notice, in manner of service and content, meet the constitutional requirements of procedural due process of law that it be reasonably calculated under all of the circumstances to apprise appellant of the Board's denial of the claim for refund, particularly in view of the following:

(a) the purported notice of the claim for refund was not mailed to appellant's counsel of record;

(b) appellant's counsel of record were appellant's sole actually and ostensibly authorized representatives in the matter;

(c) the addresses of appellant's counsel were the only addresses designated in the claim for refund;

(d) the Board recognized the status of appellant's counsel when it served notice of its denial of the petition for redetermination;

(e) the purported notice of denial of the claim for refund did not identify the claim; or specify the date the notice was mailed; or contain any reference to the statutory requirement that an action to obtain a judicial hearing on a claim for refund must be filed within 90 days from the date of mailing the notice of denial?

2. In being deprived of a trial on the merits by application of the 90 day statute of limitation, notwithstanding the fact that before the 90 day period had elapsed the Secretary and a majority of the members of the Board led appellant's counsel to believe that the claim for refund had not been acted upon, was appellant treated in accordance with the

traditional notions of fair play and substantial justice implicit in due process?

3. Where counsel of record handle a quasi-judicial proceeding before an administrative body, can any procedural process of vital legal significance be valid and fulfill the requirements of procedural due process of law if such process is not served upon the counsel of record?

The questions posed above serve to point up various facets of the basic inquiry presented by this appeal, namely: Is the constitutional guarantee of procedural due process substantial enough to protect the people from being deprived of their property without a hearing by "notices" which do not notify, such as that given by the California State Board of Equalization in this case?

STATEMENT OF THE CASE

1. The Material Facts.

The material facts are set forth above in the Questions Presented.

In passing, it should be noted that the facts on this appeal are undisputed. The interpretation of those facts as applied to a constitutional issue is not foreclosed to this Court. The conclusions to be drawn from undisputed facts will be made independently by this Court when a constitutional due process issue is involved. See *United Gas Co. v. Texas,* 303 U.S. 123, 143; *Kansas City So. Ry. v. Albers Comm. Co.,* 223 U.S. 573, 591.

2. The State in the Proceedings at Which, and the Manner in Which, the Federal Questions Were Raised, and the Disposition Thereof.

The federal questions sought to be reviewed were raised in the court of first instance during the course of the open-

ing statement made to the trial court by appellant's counsel in order to apprise the court of the nature of the cause prior to the taking of evidence. Counsel's remarks on this point were as follows:

> "Plaintiff does not deny that a purported notice of disallowance of claim for refund was mailed by defendant more than 90 days prior to the commencement of this action. But plaintiff insists that the purported notice does not constitute a notice in the legal sense because, first, it does not conform either in content or manner of service to the pertinent statutes of this state; and second, if said statutes are so construed as to admit of the form and manner of service of notice followed in this case, then they are unconstitutional as not constituting due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States." (Reporter's Transcript, p. 3)

The foregoing constitutional argument was developed in appellant's trial briefs. In its Conclusions of Law filed in the cause, the trial court held that both the manner of service and the content of the Notice of Denial were in conformity with the requirements of the applicable statutes and that the statutes, as thus applied, were constitutional.

The federal questions sought to be reviewed were raised before the District Court of Appeal in appellant's Opening Brief filed with that court in which appellant contended that the Notice of Denial was not a valid notice under the applicable statutes because it was improperly addressed and defective in content and that if the Notice be deemed to comply with the applicable statutes, the statutes as so construed do not afford appellant "due process of law" under the Fourteenth Amendment to the Constitution of the United States. The questions thus presented were passed upon by the appellate court in its opinion wherein it held that notice had been

given in conformity with the applicable statutes and that the statutes as thus applied were constitutional.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents to this Court for the first time the question whether due process requires service of notice upon *counsel of record* of a determination by a state administrative agency *which notice starts the running of a brief time period wherein judicial review can be sought,* especially when such notice contains nothing to indicate that it has such legal significance. No decision of this Court directly resolves this question. However, the general requirements of due process applicable to notices are set out in *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, as follows:

> "• • • when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (p. 315)

It is only natural and reasonable that one desirous of informing a party who has counsel of record would serve the notice on counsel. This procedure is followed in courts of law and simple justice requires the same procedure before administrative agencies acting in a quasi-judicial capacity.

As a result of the vast expansion of government by administrative agencies—national, state and local—such agencies have commonly become courts of first resort, i.e., unavoidable preliminary steps to the attainment of judicial hearings. In such instances, the procedural safeguards protecting one's rights at the judicial level mean nothing if similar safeguards do not exist at the administrative level. The

chain of procedural safeguards is no stronger than its weakest link.

The increasing complexity of the individual-state relationship has made the use of counsel essential. When one retains counsel to represent him before an administrative agency or a judicial tribunal he rightfully and of necessity relies completely upon counsel to conduct all aspects of the case. This trust is the essence of the attorney-client relationship. The very nature of this relationship requires that if the client is to be effectively notified, the notice must be served upon the attorney. In this case the only "notice" given was mailed to the client and was in such form that only an attorney could have appreciated that the mailing thereof could have instituted the 90 day period within which judicial review could be sought. Moreover, in this case appellant's counsel were thereafter, but prior to the expiration of the 90 day period, informed by the Secretary and three members of the five-man Board that the claim had not yet been acted upon.

We submit that the questions of due process presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

[134 A.C.A. 181]

In the District Court of Appeal of the State of California
First Appellate District, Division Two

1 Civil No. 16297

Pacific Gas & Electric Company, a corporation,
Appellant,
v.
State Board of Equalization,
Respondent.

OPINION

[182] Nourse, P. J.—The Pacific Gas and Electric Company, hereinafter called the Company, appeals from a judgment denying its action for refund of sales tax paid in the amount of $324,953.94 plus interest, on the ground that said action was barred by the provisions of section 6933 of the Revenue and [183] Taxation Code. Said section requires the court action to be brought by the claimant within 90 days after the mailing of the notice of the State Board of Equalization's action upon the claim and provides further: "Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." It is undisputed that a notice of disallowance of claim for refund was mailed by the State Board of Equalization, hereinafter called the Board, on May 7, 1951, that it was received at the Company's principal

act on it is the risk of the addressee corporation and depends on its care. In this case it is conceded that the address to which the notice was addressed was that of appellant's principal office.

Appellant next contends that because section 6906, *supra*, requires service of notice "on the claimant" this means on the claimant as such at the address which appears in the records of the Board on the claim for refund. The contention is wholly without merit. The "claimant" in section 6906 and the "retailer" etc. in section 6486 are descriptive of the same party in interest, here the Company. Appellant's claim for refund states, at the top, names and addresses of counsel, as pleadings often do, but such addresses of counsel do not normally constitute the address of the party, if they are not expressly designated as such. The facts in this case make it especially clear that appellant did not designate another ad [185] dress as its own, than its main office address at 245 Market Street. The names and addresses of counsel at the head of the claim for refund read:

"Chaffee E. Hall
351 California Street
San Francisco 4, California
GArfield 1-2470
Robert H. Gerdes
Richard H. Peterson
John A. Sproul
245 Market Street
San Francisco 6, California
SUtter 1-4211"

The claim for refund was transmitted to the Board by a letter signed by Robert H. Gerdes which letter bears the letterhead:

"Pacific Gas and Electric Company
245 Market Street
San Francisco, California"

It also contains in small print the name of Mr. Gerdes as general counsel and of 10 associate attorneys among whom are Messrs. Peterson and Sproul. From the above the only sensible conclusion the Board could make was that 245 Market Street was the address of the Company and of the members of its legal staff which acted as counsel and that 351 California Street was the address of the outside counsel Mr. Hall. If the matter presented any question of fact it was resolved against appellant by the finding: "The Notice of Denial of Refund was mailed on May 7, 1951, to the retailer, the Company, at its main office and its address as shown on the records of the Board, 245 Market Street, San Francisco, California." As sections 6906 and 6486 provide for notice by mailing addressed to the party and not to its counsel, the above manner of addressing was the correct one. The sections do not contain any indication of a duty to mail to more than one address for one party, as also contended by appellant.

Appellant further relies on the words in section 1013 Code of Civil Procedure: "addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence." As we have held that appellant did not give on any document as its office address an address other than 245 Market Street, and that that address is also the place of appellant's residence (principal place of business) and its [186] address as shown on the records of the Board, the point is without importance and we need not decide what

relation exists between the quoted provision of section 1013 Code of Civil Procedure and the provision of section 6486 Revenue and Taxation Code that the notice should be addressed to the party "at his address as it appears in the records of the board."

Appellant next contends that to the notice in this case is applicable the provision of section 1015 Code of Civil Procedure which provides that in all cases where a party has an attorney in an action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except certain papers not here involved. This is not so. Section 6486 Revenue and Taxation Code provides for service by mailing to the address of the party and refers to section 1013 Code of Civil Procedure, which also provides for service by mailing to the address of the party, but it does not refer to section 1015 Code of Civil Procedure, which provides for service on the attorney of record. The latter provision inconsistent with the provision specifically governing the service of notice in this case cannot be applicable. In *Lyydikainen v. Industrial Acc. Com.*, 36 Cal. App. 2d 298 [97 P.2d 993], which case held section 1015 applicable to mailing of papers in proceedings before the Industrial Accident Commission, there were references to the whole chapter in which section 1015, *supra,* is contained so that it was made directly applicable, and there were no conflicting provisions.

We find nothing unreasonable or against common sense or good faith in a construction of the statute which upholds the addressing of an important paper to the address of appellant's main office, which is also the office of its legal staff. That the notice did not reach that staff or appellant's outside counsel although it was correctly delivered, seems the fault of appellant and its employees only.

Appellant predicates the invalidity of the notice also on alleged defects in its content, to wit that it did not contain a proper designation of the transaction to which the Board's decision related as contained in the caption of the claim for refund, and because the notice was not dated. There is no statutory provision regulating requirements of form or content of such notice. With respect to the comparable notice of entry of judgment it has been held that any notice in writing which will convey to a losing party that the judgment has been entered is sufficient. (*Bank of America v. Superior Court,* 115 Cal. [187] App. 454, 457 [1 P.2d 1081].) The notice identified the matter as "the claim for refund filed by Pacific Gas and Electric Company, 245 Market Street, San Francisco, California in the amount of $324,-953.94," and notified appellant that on Wednesday, April 18, 1951, its claim for refund under the Sales and Use Tax Law, in said amount, was denied. There can be no doubt that for appellant the amount set forth clearly and specifically identified the claim which was denied and that in that respect the notice was sufficient in law. Insofar as in this respect any matter of fact was presented the court below found in substance that the notice was reasonably certain to give the Company the required information, which finding is supported by the text and circumstances of the communication.

There is no statutory requirement that the notice be dated and the failure to start the action timely was evidently not caused by the lack of a date.

We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, although addressing a notice to counsel contrary to or in excess of the statutory require-

ments might in this case have prevented the injury, due process did not require respondent to take such a measure, the less so because the manner in which the injury occurred was not readily foreseeable and was caused by the lack of care of appellant's employees. With respect to the content of the notice appellant is not entitled to raise the constitutional question of due process because its rights were not injuriously affected by any alleged defect in the content, but only by the fact that the notice did not reach its counsel. (*American Distilling Co. v. Johnson,* [1]132 Cal. App. 2d —, — [281 P.2d 598]; 11 Cal. Jur. 2d, Constitutional Law, § 68.)

Appellant contends that the Board was estopped from relying on the 90 days' limitation from the mailing of its notice, because the notice was not given according to the precedent established by the Board of sending a copy of a notice, properly dated and informative, to appellant's outside counsel Mr. Hall. There is no merit whatever in this contention. The existence of facts constituting an estoppel was rejected in the findings. "The existence of an estoppel is a question of fact" (*Parke v. Franciscus,* 194 Cal. 284, 297 [228 P. 435]). Unless the opposite conclusion is the only one which can reasonably be drawn from the facts, the finding of the trial court [188] is binding on this court. The evidence does not show conclusively or at all the establishing by the Board of a precedent as to the giving of notice on which appellant was entitled to rely and on which it relied to its detriment. The Board had sent the notice of deficiency determination, which gave rise to the controversy, to the Company at its Market Street address; it had acknowledged receipt of the Company's petition for redetermination addressed to Richard H. Peterson, Associate

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[1]Advance Report Citation: 132 A.C.A. 85, 91.

Attorney, Pacific Gas and Electric Company at the Market Street address; it had sent the notice of hearing on said petition to the Company at its Market Street address; it had addressed the ribbon copy of the notice of redetermination denying said petition to the Company, at its Market Street address, indicating on it that a carbon copy was being sent to the attorney Mr. Hall at his address and the carbon copy had been sent to Mr. Hall with an explanatory letter; the Board had acknowledged receipt of the Company's claim for refund to the Company at its Market Street address. It cannot be said that, because the Board had once sent a copy of a notice to the Company's outside attorney, mentioning on the notice to the Company itself that such was being done, the Company could rely on such copy being sent also when the notice of denial of claim for refund which the Company received at its office did not mention the sending of such copy. There is, moreover, no evidence that the high employees of the Company who took notice of the denial of the claim of refund failed to communicate it to the Company's attorneys because of their reliance on the sending of such copy. We held earlier that the alleged defects in the content of the notice could not be held responsible for said failure.

As another ground of estoppel appellant proposes the following facts:

When in July, 1951, Mr. Carr, the manager of the Company's Tax Department, not knowing of the disallowance having been decided and noticed, inquired from the secretary of the Board, Mr. Pierce, whether he had any objection to Mr. Carr's speaking to the members of the Board concerning the placing of the claim for refund on the calendar, so that it would be taken up immediately, Mr. Pierce said that he had no objection. When thereafter on July 16,

1951, Mr. Carr informally met three members of the Board in a hotel in Sacramento, Mr. Bonelli, one of the members of the Board, who had not been present at the denial of the claim for refund, stated that at any time the Company wanted the Board to exhaust the administrative remedy in order that the Com [189] pany could go to court, the Board would be glad to do so. The other two members of the Board present acquiesced in Mr. Bonelli's statement. Mr. Carr did not discuss the status of the claim for refund with the Sales Tax Administrator or any other member of the staff of the Sales Tax Division of the Board. The rejection of any estoppel by the trial court is conclusive of this point as well as of the prior one. It cannot be said that no other conclusion from the above facts is possible than that they cause an estoppel. Litigants normally do not rely and are not necessarily entitled to rely for the time of exercising their remedies on implications of informal conversations with Board members. The trial court could reasonably conclude that the failure to timely start the court action was not caused by any reliance on the stated conversation but by reliance of appellant's counsel on the fact that they had not received notice of disallowance of claim. It is also doubtful whether such informal utterances should be considered as acts of and binding on the Board as such.

As we are bound by the decision of the trial court that there was no factual basis for any estoppel, we need not decide whether facts which normally cause an estoppel could, if proved, have overcome the limitation provision of section 6933 of the Revenue and Taxation Code.

Judgment affirmed.

DOOLING, J., and KAUFMAN, J., concurred.

[Endorsed]: Filed June 27, 1955. Walter S. Chisholm, Clerk

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Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal First Appellate District, State of California

MOTION TO DISMISS

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IN THE

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OCTOBER TERM 1955

No. 613

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal First Appellate District, State of California

MOTION TO DISMISS

Appellee, State Board of Equalization, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss the appeal in the above entitled case on the grounds: (a) that the appeal does not present a substantial federal question; and (b) that two of the three federal questions sought to be raised were neither timely or properly raised, nor expressly passed on by the court below.

STATEMENT OF CASE

This case involves a notice of denial of a claim for refund of sales tax which was mailed on May 7, 1951, pursuant to statute by the State Board of Equalization (sometimes hereinafter referred to as the "Board") to Pacific Gas and Electric Company (sometimes hereinafter referred to as the "Company") at its address as shown on the records of the Board, 245 Market Street, San Francisco, California (Pltf.'s Ex. 1, Doc. 19; Finding XII, Cl. Tr., p. 24, ll. 23-26).[1] The notice was received by the Company on May 8, 1951, and the notice was read and its contents were noted by the general auditor of the Company, the comptroller of the Company, the assistant auditor of the Company and the chief clerk of the Company (R. Tr., p. 30, l. 12—p. 31, l. 13; Finding XII, Cl. Tr., p. 24, l. 23—p. 26, l. 6). Thereafter, the notice was placed in the Company's files and apparently forgotten.

The general auditor of the Company had previously read and noted the deficiency assessment notice sent by the Board to the Company which initiated the sales tax controversy (R. Tr., p. 31, ll. 6, 7; Finding I, Cl. Tr., p. 19, l. 23—p. 20, l. 15); he actually had made the payment of $324,953.94 tax assessed to the Board (R. Tr., p. 22, l. 23—p. 23, l. 2; Finding VIII, Cl. Tr.,

[1] The abbreviation "Cl. Tr." refers to the Clerk's Transcript and the abbreviation "R. Tr." refers to the Reporter's Transcript.

p. 23, ll. 3-6) and he had read and noted the acknowledgment of the claim for refund sent by the Board to the Company (Pltf.'s Ex. 1, Doc. 16; Finding X, Cl. Tr., p. 24, ll. 5-12).

Although the notice of denial of the claim for refund was actually received by these responsible employees of the Company on the day after the mailing of the notice, the Company did not bring its sales tax refund recovery action within 90 days after the mailing of the notice as required by Section 6933 of the Revenue and Taxation Code of the State of California, but it brought suit on the 179th day after the mailing of the notice (Finding XIV, Cl. Tr., p. 27, ll. 10-13).

While the evidence presented at the trial in the main was undisputed, there was wide variance between the Company and the Board as to the emphasis to be placed on certain of the evidence and as to the inferences which could be drawn from the evidence. The conflict was resolved by the trial court in the Board's favor and each of the trial court's findings was drawn fairly and reasonably from the evidence. The District Court of Appeal also rejected the Company's contentions and a petition for hearing filed by the Company was denied by the Supreme Court of the State of California.

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

Three questions are suggested by the Company as presented by this appeal.

The Company's first contention is that the notice was defective in manner of service and content and did not afford its procedural due process of law. This contention does not raise a substantial federal question because the evidence established and the lower courts found that the notice was not only reasonably certain to inform the Company but, in fact, did inform the Company that its claim for refund had been denied.

The Company's second contention is that it was denied due process of law because it allegedly relied on the informal conversation of a Board member which led it to believe that its refund had not been acted upon although at the time the claim had been denied. This contention does not raise a substantial federal question because none of the elements essential to invoke the doctrine of estoppel was demonstrated to exist by the Company. Moreover, the application of the doctrine of estoppel as a matter of constitutional law was not raised by the Company or passed on by the courts below.

The Company's third contention is that in administrative proceedings generally, notice must be served on counsel of record and notice served on the party

to the proceedings is violative of procedural due process of law. This contention does not raise a substantial federal question. There is no authority for such a startling proposition which would invalidate a wide variety of legislation and judicial and administrative proceedings based thereon, both federal and state. In addition, this general contention was not raised by the Company below or passed on by the courts below as a matter of constitutional law or otherwise.

I. THE NOTICE INFORMED THE COMPANY THAT ITS CLAIM FOR REFUND HAD BEEN DENIED.

A. THE NOTICE WAS NOT DEFECTIVE IN MANNER OF SERVICE

The Company contends that the notice was defective in manner of service and asserts that the notice was not mailed to counsel of record; that the addresses of counsel were the only addresses designated on the claim for refund; that counsel of record were the Company's only authorized representatives and that the Board had mailed a copy of another notice issued by it earlier in the proceeding to counsel.

It is manifest that the Board followed exactly the requirements of Section 6486 of the California Revenue and Taxation Code by mailing the notice to the Company at its main office and its address as it appeared in the records of the Board. Moreover, such address was also the address of the Company's legal

staff which acted as its counsel and was the address which appeared on the claim for refund, although a different address for outside counsel engaged by the Company also appeared on the claim for refund.

The lower courts found that the persons who actually received, read and noted the notice on behalf of the Company were acting within the sphere of their authority (Finding XV, Cl. Tr., p. 27, ll. 15-21). This finding clearly was reasonable in view of the evidence that at least one of the recipients of the notice was the comptroller of the Company and another was the general auditor of the Company who had, in fact, made the payment of $324,953.94 sales tax assessed to the Board.

The record is devoid of any evidence that the neglect of the Company's employees to call the notice to the attention of its legal staff was due to the fact that the Board, in addition to mailing to the Company another notice issued by it earlier in the proceeding, had also mailed a copy of that notice to outside counsel.

B. THE NOTICE WAS NOT DEFECTIVE IN CONTENT

The Company contends the notice was defective in content and asserts that the notice did not identify the claim; that it did not specify the date it was mailed and that it did not state that action must be brought within 90 days from the date of mailing.

The notice definitely stated that the claim for refund filed by Pacific Gas and Electric Company under the Sales and Use Tax Law in the amount of $324,953.94

was denied on April 18, 1951. It is certain that the Company did not have more than one claim for refund pending at that time under the Sales and Use Tax Law involving the amount of $324,953.94, and this clearly afforded a ready identification of the claim. When this is coupled with the fact that the notice reached responsible employees, including one who had read and noted the notice of deficiency determination, who actually had made the payment of $324,953.94 tax assessed to the Board and who had read and noted the acknowledgment of the claim seeking refund of the amount of $324,953.94, it is apparent that the Company's contention lacks merit.

The Company complains that the date of mailing did not appear on the notice. The date of mailing, however, was easily ascertainable from the postmark date on the envelope. Moreover, the date of denial of the claim for refund appeared on the notice (a date which obviously always would be prior to the date of mailing), thus providing a definite guide for a cautious taxpayer. In addition, this action was brought by the Company long after 90 days from the *receipt* of the notice by the Company.

Finally, the Company for the first time here asserts that the notice did not state that action must be brought within 90 days from the date of its mailing. Apart from the failure to raise this contention in the lower courts, the contention loses much of its force when it is observed that the California sales tax

statute from 1939 to the present time has provided for a 90 day period within which a refund action must be brought (Calif. Stats. 1939, p. 2184). From 1933, the date of original enactment, until 1939, the sales tax statute required an action to be brought within 60 days after payment of the tax under protest (Calif. Stats. 1933, p. 2610).

II. THE SUGGESTED QUESTION OF THE APPLICATION OF THE DOCTRINE OF ESTOPPEL AS A MATTER OF CONSTITUTIONAL LAW AND THE SUGGESTED QUESTION OF WHETHER NOTICE SERVED ON THE PARTY TO ADMINISTRATIVE PROCEEDINGS FULFILLS THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW WERE NOT RAISED BY THE COMPANY IN OR PASSED ON BY THE COURTS BELOW. MOREOVER, EACH OF THE CONTENTIONS LACKS MERIT.

A. INTRODUCTION

The application of the doctrine of estoppel as a matter of constitutional law was not raised by the Company or passed on by the courts below. This also is the case with respect to the contention of the Company that notice served on the party to administrative proceedings generally but not also on his counsel is violative of procedural due process of law.

Although the contentions are raised for the first time in this Court, for the sake of completeness, we shall briefly discuss each of them.

B. THE DOCTRINE OF ESTOPPEL HAS NO APPLICATION TO THE FACTS HERE PRESENTED

None of the essential elements of estoppel were demonstrated by the Company to be present in this case, and the trial court specifically found that there were no acts, language or silence on the part of the Board amounting to misrepresentation or concealment of material facts concerning the denial of the claim for refund. Furthermore, the trial court found that the Company received and had on May 8, 1951, notice and knowledge of the denial of the claim for refund. (Finding XVII, Cl. Tr., p. 28, ll. 4-8.)

The finding of the trial court was entirely proper based on the evidence because there were no acts, language or silence of the Board amounting to misrepresentation or concealment of material facts, nor were the facts unknown to the Company. In actuality, the notice of denial of the claim for refund was mailed to the Company in the manner and form required by law, and it was received and noted by responsible employees on behalf of the Company. Because of the Company's actual notification, the informal statement of a member of the Board that the Board would act soon on the claim has no materiality.

C. NOTICE SERVED ON THE PARTY TO ADMINISTRATIVE PROCEEDINGS FULFILLS THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW

As its final contention, the Company asserts that in administrative proceedings generally, service of notice

on a party but not also on his counsel is violative of procedural due process of law. No authority has been cited by the Company for this proposition and we believe there is none. If the rule were as the Company suggests, a veritable legion of federal and state legislation and judicial and administrative proceedings based thereon would be invalid.

As illustrative, in some jurisdictions statutes require personal notification of a party to judicial proceedings and preclude notice to counsel.[2] In other jurisdictions, statutes simply requiring that notice of steps in judicial proceedings be given to the adverse party have been interpreted to preclude service on the attorney.[3] There is no requirement in the Administrative Procedure Act (5 U. S. C. Sec. 1001 et seq.) for notification to other than an interested party. The Internal Revenue Code of 1954 and its predecessors require notification of the assessment of deficiencies and the denial of claims for refund only to the taxpayer.[4]

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[2] *Miles* v. *Caraker* (1907) 82 Ark. 198, 101 S. W. 174; *Cullen* v. *Collison* (1904) 110 Mo. App. 174, 80 S. W. 290; *State* v. *Gray* (1941) 71 Okla. Cr. 309, 111 P. 2d 514; *First National Bank* v. *Lester* (Tex. Civ. App., 1915) 179 S. W. 684; *J. B. King & Co.* v. *C. W. Hancock & Sons* (1913) 114 Va. 596, 77 S. E. 510; *Webb* v. *Ritter* (1906) 60 W. Va. 193, 54 S. E. 484, 498.

[3] *Tate* v. *Hamlin* (1895) 149 Ind. 94, 41 N. E. 356, 1035; *Imboden* v. *Renshaw* (1903) 102 Mo. App. 173, 76 S. W. 701.

[4] Sections 6212, 6352, Internal Revenue Code of 1954; see *Parker* v. *Commissioner* (1949) 12 T. C. 1079, 1082.

CONCLUSION

It is respectfully submitted that the appellant presents no substantial federal question for the decision of this Court and that the appeal should be dismissed.

Respectfully submitted,

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OCTOBER TERM, 1955.

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Brief in Opposition to Motion to Dismiss

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I.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellant has raised questions of constitutional law based on uncontroverted facts, and is not, as the Board suggests, seeking a determination of factual issues. The Board's apparent argument is that because federal questions arising from uncontroverted facts were resolved against appellant by the court below they are insubstantial. Successful determination of federal questions in the court

below obviously is not a condition precedent to an appeal to this Court.

A. Due Process Required the Board to Mail Notice to the Address Designated by the Appellant.

This case illustrates the injustice of a procedure which denies a claimant for tax refund the right to designate the *precise address or addresses* to which notice shall be mailed. The injustice is particularly apparent where the taxpayer is an artificial entity, such as a corporation, which can have notice imputed to it only through natural persons. Appellant is a large corporation with thousands of employees, many offices and a number of departments. It prudently designated Mr. Chaffee E. Hall's name and address as appellant's *primary address* in this tax proceeding, and the names and addresses of the other counsel of record as its secondary address. The reason, and the only reason, for placing the names, addresses, and telephone numbers of counsel on the facing page of the Claim for Refund was to designate the persons to whom notices and other communications should be addressed. The Board carelessly disregarded this designation of addresses by appellant, and thereby caused the very injury which appellant had sought to guard against.

The requirement that a notice mailed to a taxpayer by a taxing authority be mailed to the address last given to the agency by the taxpayer was read into the Internal Revenue Act of 1924 in *Dilks v. Blair* (C.C.A. 7th, 1927), 23 F.2d 831, wherein the court made the following observation:

> "The act of 1924 did not specify how the registered notice of determination should be addressed; but provision for mailing necessarily implies an appropriate address. *It is plain that such address should be as nearly calculated to reach the taxpayer as the circum-*

stances of each particular case reasonably afford • • •.

"Assessment and collection of a tax upon a mere mailing of notice of it to the taxpayer is at best drastic and summary, though perhaps necessary, *and the least the assessing officer can do to protect the taxpayer is to send the notice to such address as will be most likely to reach him, so far as the proceedings may disclose such address.* Persons cannot conclusively be presumed to retain the same address for the many years during which such matters are often pending, *and if several addresses of the taxpayer are disclosed in the proceedings, it would entail no hardship on the Commissioner to send a copy of the notice to each address of the taxpayer which the papers and records in his possession disclose.*" (Emphasis added.)

Although the *Dilks* case involved a statutory, rather than a constitutional question, it is nevertheless a specific application of the general concepts of justice and fair play inherent in due process of law. One of the leading cases dealing expressly with the requirements of due process as relating to notices is *Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306. In this case the Court held a New York statute providing for service by publication of notice of settlement of accounts of a common trust fund unconstitutional as to all persons whose names and addresses were on record with the trust company. The Court's opinion reads in part as follows:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U.S. 457; *Grannis v. Ordean,* 234 U.S. 385; *Priest v. Las Vegas,* 232 U.S. 604; *Roller v. Holly,* 176 U.S. 398. The

notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean,* supra * * * (p. 314)

"* * * when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (p. 315)

* * * * * * *

"* * * Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. (p. 318) * * *

"The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them *personally* of the accounting, at least by ordinary mail *to the record addresses.* (P. 318—emphasis added.)

* * * * * * *

"We hold that the notice of judicial settlement of accounts required by the New York Banking Law (§ 100-c (12)) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion." (p. 320)

B. When Notice Is a Person's Due, Process Which Does Not Inform Is Not Due Process.

The content of a notice must be such as to convey the required information.

Counsel for the Board admit that the only clue to the identity of the claim contained in the "Notice" is the stated

amount of the Claim: $324,953.94. They argue, however, that a reference to the amount, without more, constitutes sufficient identification of the particular claim. We submit that the amount of a claim does not necessarily distinguish it from any other claim, much less afford a self-sufficient identification of any particular claim. Unique facts and circumstances in the category of extrinsic evidence cannot cure the omission of an indispensable element from the face of the notice.

The omission from a notice of its date of mailing which date starts the 90-day period running, is likewise a fatal defect. Counsel for the Board argue that this date is supplied by the postmark on the envelope. They argue, in addition, that other dates, namely, the date of denial and the date of receipt, would serve the taxpayer's purpose just as well.

Postmarks are frequently illegible. Envelopes received by business organizations and law firms are customarily discarded before the contents thereof are delivered to the individual addressees. Moreover, the postmark is no part of the notice: it is stamped on the envelope; it is placed there by a *third party;* and it is added *after* the notice is deemed complete by deposit in the mail. As for the suggested use of dates other than the mailing date, due process certainly does not require the taxpayer to use at his peril dates other than the one upon which his rights depend.

C. Constructive Notice Is Vitiated by Subsequent Actual Notice to the Contrary.

To ignore a taxpayer's designated representatives in the service of notice, and subsequently to mislead them as to the status of a tax proceeding, violates the traditional notions of fair play and substantial justice implicit in due

process of law (See *Milliken v. Meyer*, 1940, 311 U.S. 457, 463). We have reference to the fact that appellant's counsel were led to believe by the Secretary and a majority of the members of the Board, before the expiration of 90 days from the mailing of the "Notice", that the Claim for Refund had not been acted upon, when in fact it had already been denied. Even if it were to be assumed that due process does not require crucial notices to be served upon counsel of record when they are the taxpayer's sole designated representatives, surely due process does prohibit the taxing agency from misleading such counsel by subsequent contradictory information which lulls them into a false sense of security while their client's claim becomes time-barred.

D. Whether a Person Is Entitled to Effective Representation by Counsel in Quasi-Judicial Proceedings Is a Question Worthy of This Court's Consideration.

The right of an individual involved in quasi-judicial proceedings to designate and rely on counsel for the preservation of his rights is surely guaranteed by the Constitution. Such representation cannot be effective unless important notices, and especially notices whose significance is apparent only to members of the legal profession, are required to be served on counsel of record. The absence of express authority is not a bar to this appeal. It is an invitation to the Court to consider the question. The increasing use of quasi-judicial agencies for the initial determination of individual rights, and the complexity of the problems presented to such agencies for determination, makes this one of the most important due process questions yet to be resolved by this Court. Section 1 of the 14th Amendment to the Constitution has been used since its adoption as the vehicle for preserving the rights of the individual in his relationship with the State through the application of concepts of basic justice and fair play.

II.

THE QUESTIONS PRESENTED WERE RAISED IN AND PASSED ON BY THE COURTS BELOW.

The right to a judicial hearing on the legality of a tax is guaranteed by the due process clause of the Fourteenth Amendment. As was pointed out in our Statement as to Jurisdiction, the basic question in this case is whether appellant has been deprived of its constitutional right to a judicial hearing. When phrasing the "Questions Presented" before this Court, we divided this basic inquiry into three subsidiary questions as follows:

1. Did the notice, in manner of service and content, meet the constitutional requirements of procedural due process of law that it be reasonably calculated under all of the circumstances to apprise appellant of the Board's denial of the claim for refund?

2. In being deprived of a trial on the merits by application of the 90-day statute of limitation, notwithstanding the fact that before the 90-day period had elapsed the Secretary and a majority of the members of the Board led appellant's counsel to believe that the claim for refund had not been acted upon, was appellant treated in accordance with the traditional notions of fair play and substantial justice implicit in due process?

3. Where counsel of record handle a quasi-judicial proceeding before an administrative body, can any procedural process of vital legal significance be valid and fulfill the requirements of procedural due process of law if such process is not served upon counsel of record?

Appellant's basic constitutional question was raised during the course of its opening statement to the trial court

(Reporter's Transcript, p. 3). Both the trial court and the California District Court of Appeal passed upon this question by holding that appellant had not been unconstitutionally denied a judicial hearing. The District Court of Appeal stated:

> "We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, *although addressing a notice to counsel contrary to or in excess of the statutory requirements might in this case have prevented the injury, due process did not require respondent to take such a measure* * * *." (Emphasis supplied)
>
> 134 A.C.A. 181, 187, p. 7 of Appendix to Statement as to Jurisdiction.

The Board contends that only the first of appellant's three subsidiary questions was raised and passed on by the courts below. When a single basic constitutional question has been raised and passed on in the court below, the appellant is entitled and indeed required, in presenting its appeal to this Court, to relate the question and its several elements to the facts and circumstances of the case (Rule 15).

CONCLUSION

It is respectfully submitted that the motion to dismiss should be denied.

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No. 613. PACIFIC GAS & ELECTRIC CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from the District Court of Appeal of California, First Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Robert H. Gerdes* and *Richard H. Peterson* for appellant. *Edmund G. Brown,* Attorney General of California, *James E. Sabine* and *Irving H. Perluss,* Assistant Attorneys General, and *Ernest P. Goodman,* Deputy Attorney General, for appellee. Reported below: 134 Cal. App. 2d 149, 285 P. 2d 305.